IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 170 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NAZIR UMMAR JETHVA

Versus

SUB DIVISIONAL MAGISTRATE

Appearance:

Mr PRAVIN GONDALIYA for Petitioner

RULE SERVED for Respondent No. 1

MR RC KODEKAR, APP, for Respondent No. 2

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 17/04/2001

ORAL JUDGEMENT

By this petition under Article 226 of the Constitution of India the petitioner - externee challenges the order of the externing authority,

Sub-Divisional Magistrate, Junagadh, dated 15.10.1999, and confirmed by the appellate authority in Appeal vide order dated 26.4.2000 u/s 60(3) of the Bombay Police Act, 1951.

2 For the grounds mentioned in the show-notice dated 3.7.1999 the petitioner was ordered to be externed from districts of Junagadh, Porbandar, Amreli, Rajkot City and Rajkot Rural by the respondent no.1 vide its order dated 15.10.1999. The petitioner has taken up this order before the State Government in appeal as provided under Section 60 of the Act. That appeal was rejected by the Deputy Secretary, State of Gujarat, Gandhinagar, under its order dated 26.4.2000.

3 The petitioner has violated the conditions of the externment order meaning thereby he has without permission of the authority entered into the prohibited area and the Sub-Divisional Magistrate, Junagadh, under his order dated 5.4.2000, in exercise of its powers under Section 62 of the Act ordered to keep the petitioner in District Jail, Surat, up to 18.10.2001. In pursuance of the said order the petitioner is at present in District Jail, Surat.

4 Challenging the order of externing authority as well as of the appellate authority the learned counsel for the petitioner has made two-fold contentions. But as this petition deserves to be allowed only on one ground, I do not think it necessary as also in the larger interest of saving the precious judicial time to deal with the other contention and record findings thereon.

5 It is contended that in the show-cause notice the Sub-Divisional Magistrate, Junagadh, mentions that eight cases are pending trial against the petitioner. Shri Gondaliya, learned counsel for the petitioner, submits that this is an incorrect statement made in the show-cause notice as out of eight criminal cases in four criminal cases i.e. in Criminal Cases Nos.30/1996, 199 of 1996, 230 of 1997 and 231 of 1997 the petitioner has been acquitted in the year 1998 before the show-cause notice was issued. In his submission, it is clear case of total non-applicaiton of mind on the part of the respondent no.1 while passing the order of externment. In support of his contention, Shri Gondaliya has placed reliance on the decision of this Court in the case of SULEMAN HUSA DEVJI V. STATE OF GUJARAT reported in 1989 (1) GLR 101. Challenging the order of the Sub-Divisional Magistrate, passed u/s 62 of the Act dated 5.4.2000, the learned counsel for the petitioner submits that the

petitioner was ordered to be sent to Jail for violation of condition of externment order. Relying on the decision of this Court in the case of RAMESHJI PANCHAJI THAKOR V. STATE OF GUJARAT & ORS. reported in 2000(1) GLR 171 the learned counsel for the petitioner contended that respondent no.1 has no jurisdiction to send the petitioner behind the bar for violation of externment order without his trial. It has next been contended that only on the conviction the petitioner could have been sent behind the bar and that jurisdiction rests with the Judicial Magistrate and not with respondent no.1.

6 In reply, Shri Dave, learned counsel for the respondents, do not dispute the factual aspect that in four criminal cases the petitioner was acquitted before the show-cause notice was given to him but what he submits is that this point has been considered by the externing authority.

7 It has next been contended that the petitioner has not raised this contention before the appellate authority also and it is not permissible to him to raise this contention in the proceedings under Article 227 of the Constitution of India. Carrying this contention further Shri Dave submits that before the appellate authority the petitioner has ample opportunity to produce the copy of judgements of his acquittal in four cases but that has not been done. So far as challenge to the order dated 5.4.2000 of the respondent no.1 u/s 62(2) of the Act is concerned, he is unable to satisfy this case is not covered by the decision of this Court in the case of RAMESHJI PANCHAJI THAKOR V. STATE OF GUJARAT & ORS. (supra).

8 Having given my thoughtful consideration to the submissions of the learned counsel for the parties, I find sufficient merit in the contention of the learned counsel for the petitioner that it is a case of total non-application of mind by the externing authority.

9 This petition was filed by the petitioner in this Court on 12.3.2001. It has come for preliminary hearing in the Court on 14.3.2001. On that day Rule was issued. The respondents have not filed reply to this petition and the averments made by the petitioner in para 3(E) stand uncontroverted and the same are to be taken to be true. Otherwise also, Shri Gondaliya, learned counsel for the petitioner has produced for the perusal of the Court the judgements of the Criminal Court given in four criminal cases of the petitioner given in the year 1998. In these four cases the petitioner was acquitted. The copies of

the judgements are given for perusal to Shri Dave and he is in agreement that the petitioner is acquitted in four matters. Mr Dave submits that the petitioner is acquitted in these four matters because the prosecution witnesses have turned hostile and he emphasizes that the petitioner is a person of that character as what is considered by the externing authority and on this technical ground he may not be released from the externment. He further submits that there are eight criminal cases against the petitioner and even if in four cases the petitioner is acquitted for the reasons aforesaid, the order of the respondent no.1 may be maintained. Prima facie, I find some substance in the contention and in appropriate case this Court may consider the matter in the light of the contentions urged by the learned Government pleader for referring of the matter to larger Bench. In case of RAMESHJI PANCHAJI THAKOR V. STATE OF GUJARAT & ORS. (supra) there was only one case against the externee. The Division Bench has considered this aspect and held that it is a case of non-application of mind. In this case, admittedly, in four cases the petitioner was acquitted and this decision is certainly helpful to the petitioner and his externment order cannot be allowed to stand. So far as challenge to the order dated 5.4.2001 is concerned, it also deserves to be set aside on the ground that without trial the petitioner could not have been sent behind the bars and this matter is covered by the decision of this Court in the case of RAMESHJI PANCHAJI THAKOR V. STATE OF GUJARAT & ORS. (supra). Otherwise also, when the externment order is set aside as a consequence thereto this order dated 5.4.2001 cannot stand independently.

7 In the result, this petition succeeds and the same is allowed. The orders of the Sub-Divisional Magistrate, Junagadh, dated 15.10.1999 and 5.4.2000 and the order of the appellate authority dated 26.4.2001 are quashed and set aside. The petitioner Nazir Ummar Jethva, the externee, at present in Surat District Jail, be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs.

17.04.2001 (S K KESHOTE, J.)
(mohd)
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